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In the Supreme Court of the United States

OCTOBER TERM 1930

No. 453.

THE EAST OHIO GAS COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF OHIO, *et al.*,
Appellee.

BRIEF OF APPELLANT.

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OPINION BELOW.

The opinion of the Statutory Court is printed in the record page 59 and reported in 43 F. (2d) 170.

NATURE AND HISTORY OF CASE.

Appeal under Judicial Code Section 238 from a final decree of a Statutory Court created pursuant to Judicial Code Section 266.

The bill filed by the appellant, The East Ohio Gas Company, hereinafter called "East Ohio," sought to enjoin The Tax Commission of Ohio and other state officers charged by the statutes of Ohio with the duty of fixing and collecting excise taxes from enforcing a certain order of the Tax Commission levying an excise tax on the gross receipts of East Ohio arising from the sale by it to consumers in Ohio of natural gas purchased from companies in West Virginia and Pennsylvania, deliveries being accepted by East Ohio at the Ohio state boundary line. The

bill alleged that these receipts were receipts from interstate commerce not subject to the Ohio excise tax, and that the order of the Tax Commission violated the Commerce Clause of the Federal Constitution. (R. 8.)

At the time set for hearing on the interlocutory decree the matter was submitted for final decision upon an agreed statement of facts. (R. 26.) The Statutory Court consisting of Hickenlooper, Circuit Judge, Hough and Nevin, District Judges, in a per curiam opinion held that East Ohio's gross receipts from the sale in Ohio of West Virginia and Pennsylvania gas were receipts from intrastate business subject to the Ohio excise tax. The Bill was dismissed. (R. 63.)

THE ISSUE.

The sole issue is whether the gross receipts of East Ohio from the local distribution in northern and eastern Ohio of natural gas purchased from companies in West Virginia and Pennsylvania, deliveries being accepted at the Ohio state boundary line, are receipts from interstate commerce.

THE FACTS.

East Ohio is an Ohio corporation engaged in the production and distribution of natural gas in more than fifty municipalities in the northern and eastern parts of the state. Cleveland, Akron, Canton, Massillon and Youngstown are the principal cities served. (R. 27.)

During the years in question approximately 25% of its supply was produced or purchased in Ohio. The balance was purchased approximately 72% from The Hope Natural Gas Company of West Virginia and 3% from The Peoples Natural Gas Company of Pennsylvania. (R. 27.) All three corporations are almost wholly owned subsidiaries of Standard Oil Company (New Jersey). (R. 28.)

By the Ohio statutes (printed in full, *infra*, pp. 10-11) each natural gas company is required to file an annual statement of its gross receipts prior to August 1st with The Ohio Tax Commission. This statement, on forms prepared by the Commission, sets forth the entire gross receipts of the company for business done within the state for the year next preceding May 1st, separated into receipts from intrastate business and receipts from interstate business. Each of these is again divided into receipts from sales to the Federal Government and receipts from sales to other persons. (R. 33.) The Tax Commission then determines the taxable gross receipts for the year excluding therefrom "all receipts derived wholly from interstate business or business done for the Federal Government." (G. C. Section 5455.) The taxable gross receipts are then certified by the Commission to the State Auditor who charges for collection "a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported by the Commission as the gross receipts of such company on its intrastate business for the year covered by its annual report to the Commission" by taking 1.35% of said gross receipts. (G. C. Section 5483.)

In each of the years 1927, 1928 and 1929 East Ohio filed with the Tax Commission the statement prescribed by statute on forms prepared by the Commission. Without troubling the Court with all the details of these statements East Ohio, in accordance with an opinion of the then Attorney General, reported all receipts from the sale in Ohio of West Virginia and Pennsylvania gas as receipts from interstate commerce. All other receipts were reported as receipts from intrastate commerce. (R. 33.)

In each of the three years the Tax Commission certified to the Auditor the amount shown in East Ohio's reports as receipts from intrastate business, the Auditor

computed the tax on that amount at the statutory rate and the Treasurer of State billed East Ohio and it paid the tax. (R. 33 and 34.)

On January 13, 1930, the Tax Commission made an order and finding that East Ohio had omitted certain gross receipts for the years 1927, 1928 and 1929 and accordingly it certified as additional or "omitted gross receipts" for those years the receipts from the sale in Ohio of the West Virginia and Pennsylvania gas. Subsequently, the Auditor of State computed the tax on these additional amounts, the Attorney General notified East Ohio that these additional taxes had been certified to him together with penalties for collection and demanded payment in an amount in excess of $900,000. (R. 34 and 35.) Thereafter, and within the time provided by statute, East Ohio filed an application with the Tax Commission for a review of and rehearing upon the determination of the gross receipts for the years in question, which the Commission denied. (R. 36.)

East Ohio then filed its Bill of Complaint.

The single issue presented makes important the method of procuring and marketing West Virginia and Pennsylvania gas.

The Hope Company, doing business only in the State of West Virginia, has extensive gas producing fields in that state and the relations between it and East Ohio have been controlled by a gas purchase agreement in force since 1910. This agreement with its modifications is set forth in full in the record. (R. 39.)

All of the gas sold by Hope to East Ohio passes through Hope's Hastings station located in West Virginia approximately twenty-five miles south of the Ohio River. The gas flows from producing wells in various parts of West Virginia through field lines and gathering lines into transmission lines that carry it to Hastings station. At various places along these lines Hope maintains pumping

stations for the purpose and with the effect of facilitating transmission. (R. 28.) At Hastings station the gasoline vapors are removed by what is known as the absorption method which is a continuous process involving no interruption of the flow. The purpose of removing these vapors is to avoid their later collection at low points in the transmission lines, thus interfering with transmission. (R. 28.) After the extraction of the gasoline vapors the gas is passed through a pumping station which maintains a pressure of 200 to 300 pounds per square inch in Hope's transmission lines on the discharge side leading from Hastings station to the Ohio River, the exact amount of pressure maintained being dependent upon the time of year and East Ohio's demand. These pressures are sufficient to carry the gas from Hastings station to burner tips of East Ohio's consumers. (R. 28.)

At the Ohio River the transmission lines of East Ohio and Hope are connected by "river crossings" consisting of a number of smaller pipes crossing the river, connected on each side with the larger transmission lines. The smaller lines can be separately closed on either side of the river so that in the event of leak or washout the continuance of the supply is not imperiled. The exact dividing line between the property owned by Hope and East Ohio is the low water mark on the Ohio side of the river, the cost of the river crossings having been paid by the two companies in the proportions by which they were divided by this line, which is also the boundary line between the two states. (R. 28 and 29.)

From the Ohio River East Ohio maintains and operates four trunk lines 18 to 20 inches in diameter that run north an average distance of 82 miles to what is known as Gross Farm Station in Stark County, Ohio. From this point other trunk lines run northeasterly about 40 miles to a pressure reducing station near Youngstown and still

others a distance of about 40 miles to pressure reducing stations near Cleveland. (R. 29.) A map showing the location of these lines is in evidence. (R. 58.)

The distribution system in each municipality consists of "high pressure" lines and "low pressure" lines. At the pressure reducing stations where the transmission lines are connected with the high pressure distribution lines, and again at the points where the high pressure distribution lines connected with the low pressure distribution lines, regulators are maintained. (R. 30.) These regulators are set at pressure it is desired to maintain on the discharge side. In case this is the high pressure lines, the regulators are set at 30 to 50 pounds per square inch, while in case this is the low pressure lines, they are set at the number of ounces necessary to serve consumers. Automatically the openings in the regulators are enlarged or diminished to permit a faster or slower rate of flow as may be necessary to maintain at all times on the lines on the discharge side the number of pounds or ounces of pressure at which the regulators are set. Gas is constantly flowing through these regulators at a faster or slower rate, depending upon demand. (R. 31.) From the low pressure distribution lines the gas passes directly through service lines owned by the property owner connecting street mains with consumers' appliances. (R. 31.)

The result is that the gas is constantly moving from the time it leaves the producing fields in West Virginia until it reaches its intended destination which is the burner tips of East Ohio's consumers. No interruption of flow occurs at any point in the entire operation. The effect both of pumping and of removing gasoline vapors is to facilitate transmission. (R. 29.)

The Pennsylvania gas is purchased from the Peoples Company principally during the winter season. It comes through Darlington Station owned and operated by the

Peoples Company and located in Pennsylvania about 8 miles from the Ohio line. The transmission lines of the two companies connect at the state line. East Ohio's transmission line from this point runs to Youngstown. The gas is collected in the field, pressure is increased by pumping, gasoline vapors removed and the gas transported and marketed by East Ohio through its distribution system precisely the same as in the case of West Virginia gas. (R. 30.)

The Ohio gas is carried in transmission lines from the Ohio field to the high pressure distribution systems in the municipalities where it is distributed. (R. 30.) Some of the municipalities served get only West Virginia and/or Pennsylvania gas, others get only Ohio gas and still others get mixed Ohio and West Virginia gas, the mixture occurring in the high pressure distribution mains. (R. 36.) Separation of receipts for those communities served with mixed gas was made for each year on the basis of the respective amounts of Ohio and West Virginia gas introduced into the local distribution systems as determined by meters at the points of introduction. (R. 37.)

In addition to excise taxes East Ohio paid during the years in question local real and personal property taxes assessed against it by the Tax Commission and local taxing authorities in excess of $1,000,000 each year. (R. 39.)

SPECIFICATION OF ERRORS RELIED UPON.

1. Said District Court erred in holding that gross receipts of The East Ohio Gas Company from the sale of natural gas purchased by it from the Hope Natural Gas Company of West Virginia and the Peoples Natural Gas Company of Pennsylvania at the Ohio state boundary line, and transported, distributed and sold by The East Ohio Gas Company to consumers in municipalities in the northern and eastern parts of the State of Ohio, are receipts

from intrastate business taxable as such by the excise tax statutes of the State of Ohio (Section 5483 of the Ohio General Code and related sections), and in holding that an order of the Tax Commission of Ohio, fixing such gross receipts as subject to such tax and levying a tax thereon, does not violate the commerce clause (Article I, Section 8) of the Constitution of the United States.

2. Said District Court erred in refusing to grant the injunction prayed for in the Bill of Complaint seeking to enjoin the enforcement of said order of the Tax Commission of Ohio by it and by other officers of the State of Ohio, and in dismissing the Bill of Complaint.

SUMMARY OF ARGUMENT.

I. The issue is narrowed to the question of whether an admittedly interstate movement of natural gas into the state in control of the appellant ends before its delivery to appellant's consumers. That this is so results from these considerations:

(a) The language of the Ohio excise tax statutes as well as their history shows that the tax is levied for the privilege of doing an intrastate business and is to be measured by the gross receipts of that business.

(b) This Court has repeatedly held that the state may not tax the gross receipts of interstate business even though that business is essentially local in character.

(c) This Court has held that the fact that title and possession of natural gas moving in interstate commerce changes at the state boundary line does not affect the character of the movement.

II. The interstate movement in this case continues to consumers' appliances. In *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, it was expressly decided that the local distribution of natural gas by an importing

company is an integral part of interstate commerce. This case is controlling. Moreover, it is supported both by the principle that when an interstate character has been acquired it continues until the commodity "reaches the point where the parties originally intended that the movement should finally end" (*Illinois etc. Railroad Co. v. Railroad Commission*, 236 U. S. 157, 163) and by the principle that where "the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it" it is interstate throughout. (*Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 113). In this case the intended destination from the beginning is East Ohio's consumers and the transmission is as continuous and rapid as science can make it.

Since the movement is conceded to be interstate when the gas enters Ohio there is no logical or practical point to assert a change until the gas reaches consumers' appliances. Suggested analogies that bulk is broken and the gas stored or processed when it passes from transmission to distribution lines of the importing company are inapplicable and contrary to facts.

ARGUMENT.

I. THE ISSUE IS NARROWED TO THIS: DOES THE ADMITTEDLY INTERSTATE MOVEMENT OF NATURAL GAS IMPORTED INTO OHIO BY EAST OHIO END BEFORE ITS DELIVERY TO EAST OHIO'S CONSUMERS?

That the issue is so narrowed results from the following considerations:

(a) The Ohio Excise Tax is for the Privilege of Doing an Intrastate Business and is Measured Solely by the Receipts of that Business.

Ohio Statutes. The pertinent provisions of the statutes of Ohio are as follows, section references being to the Ohio General Code:

"5474. *Contents of statement.*—In the case of all such public utilities except railroad, street, suburban and interurban railroad companies and express, telegraph and telephone companies, such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations, *but this shall not apply to receipts from interstate business, or business done for the federal government.* Such statement shall also contain the total gross receipts of such company for such period in this state from business done within the state." (All italics ours.)

"5475. *Valuation determined.*—On the first Monday of September the commission shall ascertain and determine the entire gross receipts of each electric light, gas, natural gas, pipe line, waterworks, messenger or signal, union depot, heating, cooling and water transportation company for business done within this state for the year then next preceding the first day of May and of each express, telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June, *excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government.*"

"5476. *Gross receipts.*—The amount so ascertained by the commission, in such instance, for the purposes of this act, shall be the gross receipts of such electric light, gas, natural gas, pipe line, waterworks, express, telegraph, telephone, messenger or signal, union depot, heating, cooling or water transportation companies for business done within this state for such year."

"5483. *Excise tax.*—In the month of October, annually, the auditor of state shall charge, for collection

from each electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, cooling and water transportation company, *a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its intra-state business for the year covered by its annual report to the commission,* as required in this act, by taking one and thirty-five one hundredths per cent. of all such gross receipts, which tax shall not be less than ten dollars in any case."

It is to be observed of these sections:

1. That section 5474 excludes from gross receipts "receipts from interstate business or business done for the federal government."

2. That section 5475 directs the Tax Commission to determine taxable receipts by excluding therefrom "all receipts derived wholly from interstate business or business done for the federal government."

3. That section 5483 imposes an excise tax "for the privilege of carrying on its intrastate business, to be computed on the amount so fixed and reported by the Commission as the gross receipts of such company on its intrastate business."

History of Ohio Excise Tax. Moreover, a brief reference to the history of the present Ohio statutes shows that the Legislature clearly understood the limit of state power to be that it could levy an excise tax based only on the receipts of intrastate business.

Ohio's first excise tax on the receipts of public utilities was passed in 1896, 92 Ohio Laws 79. It was a tax of one-half of one per cent. of *"the gross receipts of such company for business done within the state of Ohio."* It was thus frankly an excise tax based on the gross receipts

from all business done in the state whether that business was intrastate, interstate, or foreign commerce. The rates provided by this first act were later increased (95 Ohio Laws 139 and 96 Ohio Laws 124), but the measure of the tax remained the same.

In 1908 this Court in *Galveston etc. Railway Co. v. Texas*, 210 U. S. 217, held invalid a Texas statute imposing a tax upon railroads "equal to one per cent. of their gross receipts." Mr. Justice Holmes in delivering the opinion of the Court said, page 224:

> "In *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites the earlier cases to the same effect. Later ones are *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Telegraph Co. v. Pennsylvania*, 128 U. S. 39; *Western Union Telegraph Co. v. Seay*, 132 U. S. 472. See also *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25; *Ficklen v. Taxing District of Shelby County*, 145 U. S. 1, 22; *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 158 U. S. 431, 438; *McHenry v. Alford*, 168 U. S. 651, 670, 671; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 162."

At its next session, 1910, the Ohio Legislature passed a new excise tax law, 101 Ohio Laws 399, §§53, 55, 61, in the form of its present law, purporting to be an excise tax upon the privilege of doing "intra-state business" and excluding from the gross receipts on which the tax is based receipts from "interstate business and business done for the Federal Government." Subsequently that law has been amended only in respect of the rate so that for all

purposes in which we are presently interested it stands today in the precise form in which it was enacted in 1910.

It is obvious from this history that the Legislature, recognizing its inability to base a tax upon gross receipts that included receipts from interstate commerce, attempted to make up part of the revenue of which it was thereby deprived by an increase in the rate. This reason was later urged in *Ohio Tax Cases*, 232 U. S. 576, as a ground of invalidity of the *Ohio* excise tax. It was also urged that since the statute only excluded "receipts from interstate business" it was invalid because it taxed receipts from foreign commerce. This Court, tracing the history of the Ohio legislation, held, however, that from this history it could not hold that the tax was anything other than an excise tax and on gross receipts of intra-state business. And it interpreted the exclusion of receipts from "interstate business" to be but another way of saying that it was attempting to tax only receipts from intra-state business. Upon this point Mr. Justice Pitney said, page 591:

> "Section 97, however, indicates an intent to take into consideration for the purpose of measuring the excise tax only the earnings upon intra-state business, and it seems clear enough that in the former sections the word 'interstate' was used as meaning 'not intra-state,' rather than in its technically correct signification."

It is therefore abundantly clear not only from the language of the act itself but from its history and interpretation by this Court that it assumes to tax only receipts from intra-state commerce and that it does not assume to tax receipts from interstate commerce or business done for the Federal Government.

Even if the state had the power to tax interstate commerce, however local in character, it has clearly not assumed to do so.

(b) A State Excise Tax on Gross Receipts from Interstate Commerce Is Invalid.

The tax in question is neither a property tax nor is it imposed in lieu of a property tax. No claim to the contrary has ever been made. See *Ohio Tax Cases*, 232 U. S. 576. Moreover, the State of Ohio imposes a tax on all real and personal property of public utilities and East Ohio has paid this tax in the years in question in excess of $1,000,000 each year. (R. 39.)

It was recognized below that the State cannot levy an excise tax for the privilege of doing an interstate business or measure such a tax by the gross receipts from that business. Upon this the lower Court said the question was whether the business is

> "interstate commerce, which, it is conceded, can not be burdened by an excise tax. U. S. Constitution, Art 1, sec. 8; *Rosenberger v. Pacific Exp. Co.*, 241 U. S. 48, 50; *New Jersey Telephone Co. v. Tax Board*, 280 U. S. 338, 346."

This had, of course, been decided in *Galveston etc. Railway Co. v. Texas*, 210 U. S. 217, in which, at page 224, Mr. Justice Holmes cited the many previous decisions of this Court upon that point.

Since the decision in the *Galveston* case the same principle has many times been applied, the most recent application being in the case of *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments of New Jersey*, 280 U. S. 338. That case involved the validity of a New Jersey "franchise tax" of 5% of that part of the telephone company's gross receipts from all its business in the state represented by the proportion that its lines in the public streets bore to the length of its whole lines in the state. Approximately one-fourth of these gross receipts came from interstate commerce. The State also levied and collected taxes on the Company's real and personal property.

In the opinion of the Court by Mr. Justice Butler, page 346, it is said:

> "It is elementary that a State may tax property used to carry on interstate commerce. *But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a State may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. Pullman Co. v. Richardson,* 261 U. S. 330, 338, and cases cited. *Sprout v. South Bend,* 277 U. S. 163, 171. This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

That a state may not levy an excise tax on interstate commerce even though that commerce is essentially local in character has likewise been held. The difference in this respect between the power of the state to regulate rates and to levy a privilege tax is strikingly illustrated in the two cases of *Port Richmond Ferry v. Hudson County,* 234 U. S. 317, and *City of Sault Ste. Marie v. International Transit Company,* 234 U. S. 333. In the former it was held that a state might regulate the rates to be charged for an interstate ferry service essentially local, while in the latter case, announced at the same time, a state license fee exacted for the privilege of conducting a similar ferry was held invalid.

The New York Court of Appeals has had before it both the right of the state to regulate rates and the right of the state to tax gross receipts of the Pennsylvania Gas Company which procured its supply in Pennsylvania and distributed it locally in New York.

In the first case, *In Re Pennsylvania Gas Company,* 225 N. Y. 397, 122 N. E. 260, that Court in an opinion by

Chief Justice Cardozo held that the interstate movement continued to consumers' appliances, but that since the distribution was local in character the state might regulate the rates to consumers in the absence of congressional action. This case, hereinafter discussed, was affirmed by this Court in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23.

Later there came before the New York Court of Appeals the case of *People Ex Rel. Pennsylvania Gas Company v. Saxe*, 229 N. Y. 446, 128 N. E. 673, in which there was involved the validity of a New York franchise tax assessed against the Pennsylvania Gas Company, the measure of said tax being stated by the statute to be gross earnings "from all sources within this state." The Court thus was required to pass upon the right of the State of New York to tax the gross earnings of the very company whose rates it and this Court had previously held were subject to state regulation. Chief Justice Cardozo again rendered the opinion and held the tax invalid. He said that since the company's sole business was interstate "it is here of right, and the state may not charge it with a tax as a condition of its presence."

We submit that these cases are all correctly decided and that even though the business of East Ohio in distributing gas in Cleveland and other communities is of such a nature that local aspects dominate, it is nevertheless an integral part of interstate commerce not subject to tax.

(c) Delivery at State Line Does Not Change Interstate Character of Movement.

That delivery of gas at the Ohio state line and a change of possession and title at that point is of no significance was decided in *Peoples Gas Co. v. Public Service Commission*, 270 U. S. 550, in respect of natural gas, and *Public*

Utilities Commission v. Attleboro Steam & Electric Co., 273 U. S. 83, in respect of electric energy.

The Peoples Gas Company case involved facts as to the delivery of natural gas by the same West Virginia company that is here involved, namely The Hope Company, to The People's Company of Pennsylvania at the West Virginia-Pennsylvania line with physical situation, method of transmission and relation between the companies the same as here.

In delivering the opinion of this Court Mr. Justice Van Devanter said, page 554:

> *"As respects the West Virginia gas we are of opinion, in view of its continuous transportation from the places of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 112, 113; *Public Utilities Commission v. Landon*, 249 U. S. 236, 245; *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 28; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 280-281; *Pennsylvania v. West Virginia*, 262 U. S. 553; *Binderup v. Pathe Exchange*, 263 U. S. 291, 309; *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298; *Ohio Railroad Commission v. Worthington*, 225 U. S. 101; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Shafer v. Farmers Grain Co.*, 268 U. S. 189."

II. THE INTERSTATE MOVEMENT IN THIS CASE CONTINUES TO CONSUMERS' APPLIANCES.

(a) Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, is controlling.

In the above case the Pennsylvania Gas Company procured its supply of natural gas in Pennsylvania, transported it to the state of New York and distributed it to consumers in certain cities in that state under local franchises. The New York Public Service Commission asserted jurisdiction over the rates to local consumers. The sole issue presented to the New York Courts and to this Court was whether the relations between the Pennsylvania Company and its local consumers was interstate commerce not subject to state regulation. If that relation were not part of interstate commerce this Court had no jurisdiction.

This Court held that the interstate movement continued to consumers' burner tips. Having thus sustained jurisdiction it further held that the relation between the Pennsylvania Company and its consumers was one in which local aspects rather than national predominated and that in consequence in the absence of congressional action the state could regulate rates.

Previously in *Public Utilities Commission v. Landon*, 249 U. S. 236, this Court had held that gas brought into a state by an importing company and there sold to independent local distributing companies, deliveries being made at the local distribution systems, continued in interstate commerce with national aspects dominant until sale and delivery to the local distributing companies, but that the subsequent distribution and sale by them to consumers was intrastate commerce. The state, therefore, had power to regulate the rates to be paid by consumers but no power over rates paid by the distributing companies.

The *Landon* case having been urged upon the Court in the *Pennsylvania Gas* case on behalf of the New York Public Service Commission, Mr. Justice Day said, page 28:

> "This case differs from *Public Utilities Commission v. Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce, and therefore, the matter was subject to local regulation.
>
> *"In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce and therefore subject to applicable constitutional limitations which govern the States in dealing with matters of the character of the one now before us."*

Having determined that the sale of gas by the Pennsylvania Gas Company to its consumers was interstate commerce he then considered whether or not it was interstate commerce of such a nature that the state could not in the exercise of the police power make reasonable regulation of local rates in the absence of congressional action. He pointed out that such a movement in interstate commerce had both national and local aspects; that

in some phases of the movement national aspects were dominant, and in others, local; that in the distribution and sale of gas in the ordinary way to consumers local aspects were dominant; and that in consequence until Congress by appropriate legislation asserted its jurisdiction the state might regulate rates.

This case, therefore, directly holds that the local distribution of gas by an importing company under local franchises is an integral part of interstate commerce. With the question of whether local or national aspects are dominant we are not now concerned. That distinction, however sound as applied to police regulations, has never been applied to taxation by a state.

In *Missouri v. Kansas Gas Co.*, 265 U. S. 298, the question was again presented to this Court of the right of a state to regulate the rates of an importing company selling natural gas to independent local distributing companies. Again this Court in an opinion by Mr. Justice Sutherland affirmed the principles of the *Landon* case, pointed out that "there is nothing in *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23, inconsistent with this view" and held that the state had no power to regulate the price at which the importing company could sell to the independent local distributing companies even in the absence of congressional action.

It is to be noted that in deciding that local distribution in the *Landon* case was intrastate commerce emphasis was placed on the fact that the local distributing companies were "independent" and in no sense representatives of the importing company.

(b) Supporting Decisions of this Court.

In the above decisions the Court was applying a settled principle thus expressed by Mr. Justice McReynolds in *Illinois etc. Railroad Company v. Railroad Commission*, 236 U. S. 157, at page 163:

> "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And *generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end. McNeill v. Southern Railway,* 202 U. S. 543, 559; *Southern Pacific Terminal v. Interstate Commerce Commission,* 219 U. S. 498, 527; *Ohio Railroad Commission v. Worthington,* 225 U. S. 101, 110; *Texas & New Orleans Railroad v. Sabine Tram Co.,* 227 U. S. 111, 126; *Louisiana Railroad Commission v. Tex. & Pac. Ry.,* 229 U. S. 336, 341."

The principle is also stated in *Western Union Telegraph Co. v. Foster,* 247 U. S. 105, 113; *Southern Railway Co. v. Prescott,* 240 U. S. 632, 639; *Binderup v. Pathe Exchange, Inc.,* 263 U. S. 291, 309.

The application of this principle in the *Landon* case, *supra,* resulted in holding that the interstate movement ended with the sale of gas by the importing company to the local distributing company. The application of this principle in the *Pennsylvania Gas* case, *supra,* resulted in holding that the interstate movement continued until the sale of the gas to the local consumers of the importing company. In other words, in one case the intended destination of the gas was the local distributing company and in the other the local consumers.

Another test of an interstate movement likewise supports the decision in the *Pennsylvania Gas* case.

In *Western Union Telegraph Co. v. Foster,* 247 U. S. 105, the New York Stock Exchange contracted with telegraph companies to furnish them continuous stock quotations to be furnished by them in turn by ticker service to subscribers approved by the Stock Exchange. Under this

contract the quotations as received from the Exchange in New York were wired in Morse Code to Boston where they were decoded and wired to subscribers' tickers, the wires of other companies being in part used in the process. This Court held that the transmission of the quotations remained interstate commerce until completed in the office of subscribers and on page 113 of the opinion Mr. Justice Holmes said:

> "If the normal, contemplated, and followed course is a transmission as continous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond."

(c) Application to Facts in this Case.

The language last above quoted reads directly upon the facts of this case. At pumping stations in West Virginia and Pennsylvania the gas is pumped to a pressure sufficient to carry it to consumers' appliances in Ohio. (R. 29, 30.) Only friction in the lines and the reduction of pressures incident to distribution reduce the speed of transmission precisely as an interstate train must reduce speed to discharge passengers. Nevertheless, the transmission remains as continuous and rapid as science can make it. This is the normal, contemplated and followed course.

That in the present case the consumers of East Ohio are the ultimate destination of all West Virginia gas purchased is evidenced not only by all the practical aspects of that movement, but by nearly every paragraph of a contract of more than twenty years' standing with the Hope Company. (R. 39.) In the second "whereas" clause it recites that East Ohio holds franchises and owns distributing systems in Cleveland and other cities and has trunk lines from the Ohio River connected therewith. (R. 40.) In

paragraph "Second" East Ohio agrees to purchase and the Hope Company agrees to furnish "all the natural gas requisite for the supply of domestic consumers" of East Ohio and sufficient to fulfill contracts with industrial consumers "approved" by the Hope Company. (R. 40.) By paragraph "Seventh" the Hope Company is "obligated to deliver gas for domestic consumers of the Ohio Company in preference to all other consumers" excepting only certain other domestic consumers. (R. 43.) By paragraph "Eighth" East Ohio agrees to keep the Hope Company "at all times fully informed of all facts tending to show the amount of natural gas which will be necessary from time to time to supply its requirements" thereunder. (R. 44.) By paragraph "Ninth" East Ohio agrees to keep its transmission lines and distributing systems in good order and condition and to measure the same by standard meters. (R. 44.) By paragraph "Tenth" East Ohio agrees that the Hope Company shall at all times have access to its meters "to measure the amount of gas sold to consumers and the right to examine its meters, pipes and apparatus." (R. 44.) By paragraph "Sixteenth" as amended April 30, 1924, ultimate settlement for gas delivered by the Hope Company to East Ohio is to be made and during the three years in question was made on the basis of the total quantity of gas delivered to East Ohio's consumers as shown by consumers' meters. (R. 55.) By paragraph "Eighteenth" East Ohio is required each month to furnish the Hope Company a detailed statement of the amount of gas charged to its domestic consumers during the preceding month showing separately the amount so supplied in each city and town and other pertinent information. (R. 51.) Finally by paragraph "Twentieth" East Ohio agrees to use diligent effort to maintain and keep up its deliveries of natural gas "under the spirit and intention of this agreement in order that the natural gas which the Hope Com-

pany is prepared to deliver hereunder may find a continuous market." (R. 52.)

Throughout the parties to that contract were intending to procure natural gas in West Virginia for the consumers of East Ohio in Ohio and the practical operation under that contract as set forth in the agreed statement of facts was precisely in accordance with that understanding.

No written contract exists between East Ohio and the Peoples Company for the small amount of gas purchased from that company during the winter months of the years 1927, 1928 and 1929. That gas was, however, received by East Ohio at the state line, transported directly to its distribution systems and distributed to consumers so that without contract and by the usual course of dealing it likewise was destined from the beginning of the movement to East Ohio's consumers' appliances.

It follows that all of the gas procured by East Ohio from the Peoples Company and from the Hope Company continued to be interstate commerce throughout its movement. The amounts received for it from consumers were, therefore, receipts from interstate commerce upon which the state of Ohio under well settled decisions could not impose an excise tax and upon which by the express language of the Ohio Act it did not assume to impose an excise tax.

(d) Comments on Decision Below.

In its *per curiam* the lower Court said that East Ohio's business "was a *local or intrastate* business which might properly thus be taxed." (R. 61.) In so doing the Court assumed that if the business was essentially local it was, therefore, intrastate. Thus the Court did not observe the distinction made in the *Pennsylvania Gas Company* case and others between the national and local aspects of an interstate movement and did not recognize that a business

may be an integral part of interstate commerce even though it is essentially local.

The Attorney General argued below that the interstate movement ended at the "city gate." Presumably by this was meant the points at which the gas passes from the transmission lines into the high pressure distribution lines. The Court below, following this theory, suggested certain analogies in the following language:

> "Thus bulk must be considered as broken when the gas passed from the great gas transportation lines into the network of smaller distributing lines, in analogy to the original package doctrine; the interstate journey must be considered as ended when the gas is placed in proper containers, be these tanks or low pressure distribution system, for delivery to local trade, in analogy to the storage cases (*Atlantic Coast Line v. Standard Oil Co.*, 275 U. S. 257, 269); the gas must be considered processed and modified in an essential characteristic when its pressure is so reduced as to make it available for consumers' use, if analogy to the processing of goods, as breaking the interstate journey, be drawn; and, so far as the relationship between the company and consumers is concerned, it makes no difference whatever to the latter whence comes the gas. The trade was essentially local. The transportation of the gas from West Virginia was but a preparation for it. *Wagner v. City of Covington*, 251 U. S. 95, 103." (R. 61-62.)

All of the analogies suggested by the lower Court were urged upon the New York Court of Appeals in *In Re Pennsylvania Gas Company*, 225 N. Y. 397, 122 N. E. 260. They were also urged upon this Court when that case came before it, but are not discussed in the opinion.

In the opinion below Chief Justice Cardozo considered these analogies and we beg leave to quote at some length his reasons for rejecting them. He said, 122 N. E. 261-262:

> "Interstate commerce does not end until the subject-matter of the sale has been broken up or redis-

tributed or absorbed in the common mass of property within the state. *Leisy v. Hardin, supra.* (135 U. S. 100.) When that moment arrives is not always easy to determine. The test to be applied will vary with the method of transportation and the subject of the sale. * * * But the rule of the 'original package' is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed, there is need of other tests. [Citing Cases.] * * * The law does not ask itself what the parties 'may' do, but what, in the normal course of business, it is expected that they 'will' do. 'If the normal, contemplated, and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond.' *W. U. Tel. Co. v. Foster, supra,* 247 U. S. at page 113, 38 Sup. Ct. at page 439, 62 L. Ed. 1006. The essential unity of the transaction remains the final test. *Swift & Co. v. U. S.,* 196 U. S. 375, 399, 25 Sup. Ct. 276, 49 L. Ed. 518; *Rearick v. Pennsylvania,* 203 U. S. 507, 512, 27 Sup. Ct. 159, 51 L. Ed. 295.

"Subjected to that test, the transactions of the petitioner's business have the unity and directness of interstate commerce. There is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterwards develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage had been reached. *Kehrer v. Stewart,* 197 U. S. 60, 65, 25 Sup. Ct. 403, 49 L. Ed. 663; *Brown v. Houston,* 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. The transactions would then be similar to those common in the oil business. We do not now determine the rule that should govern them. It is enough to hold

that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end till the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted, not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say, in the language of Holmes, *J.*, in *W. U. Tel. Co. v. Foster, supra,* that the transmission is 'as continuous and rapid as science can make it.' "

The methods of transporting and distributing natural gas are standard. In the *Pennsylvania Gas* case they were undoubtedly in all essentials the same as in this case.

The truth is, as Chief Justice Cardozo held, that none of the analogies suggested by the lower Court have the slightest applicability here. Repeatedly this Court has said "interstate commerce is a practical conception" and "the essential nature of the movement" determines its character. The practical fact is that we have here principally two companies, one engaged in producing and the other engaged in distributing natural gas, their properties and their business being separated by state lines, but both owned by a common owner. Practically and commercially it is a single enterprise for the production of gas in one state and its sale and distribution in another. Actually the gas passes, and from the beginning of the movement is intended to pass, without interruption from producing fields to consumers' burner tips. There is no more reason for selecting the so-called "city gate" as the termination of that movement than for the selection of any other point along the line.

The truth is that the adoption of a descriptive word such as "city gate" is apt to confuse. There is no "city gate." At various places the distribution systems are connected with the transmission lines by means of regulators. But nothing of significance happens at those points. "Gas is constantly flowing through these regulators at a slower or faster rate depending upon demand" (R. 31).

No deliveries are made at those points.

No breaking of bulk occurs there because the gas is not packaged.

No gas is put into containers or storage at those points or elsewhere. The pipe lines from producing fields to consumers is a continuous and the only container through which the gas constantly moves.

No processing occurs at those points or elsewhere, although it is true that the pressure during transmission is higher than the pressures either in the producing fields, the gathering lines or the distribution systems. This change in pressure, however, produces no change in the nature of the gas that by even remote analogy can be termed "processing." Moreover, the sole purpose of increasing pressure is to facilitate transmission. It would be strange indeed if the quality of natural gas that makes it possible to transport it long distances in interstate commerce should now be held to destroy its character as such before it reaches the destination it was compressed to reach.

And it is of no more importance that East Ohio's consumers do not expressly contract for West Virginia gas than it was in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, and *Shafer v. Farmers Grain Co.*, 268 U. S. 176, that the farmers selling grain to local elevators in North Dakota did not contract that the grain should be shipped out of the state, or that the local purchasers of products in original packages do not specify products produced in other

states. *Bowman v. Continental Oil Co.*, 256 U. S. 642, and other similar cases.

The fact is that if this movement is an interstate movement at the time it crosses the Ohio state boundary line, of which there is no dispute, there is no logical or practical place to assert a change in the character of that movement until it reaches the only destination intended for it, namely consumers' appliances. Fiction and not fact will control if it is held otherwise.

The decision of the lower Court should be reversed and injunction allowed as prayed.

Respectfully submitted,

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